IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 432.

MORAND BROTHERS BEVERAGE CO., ET AL.,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

REPLY TO BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The position taken by respondent Board in its Brief indicates that it has misconceived the theory of petitioners' argument and has misstated the findings below. This misstatement—that the Court found that petitioners discharged their salesmen for the purpose of discouraging membership in the Union—appears in the Questions Presented (Br. 2), Statement of the Court's second opinion (Br. 11), and Argument (Br. 14). To clarify the Board's misconception and to correct the Board's misstatements is the purpose of this reply.

Board's Position.

The Board does not deny the logic of petitioners' argument that if an award of back pay would not be appropriate in the event of a temporary severance then such

an award would not be proper under the circumstances involved in the instant case even though the severance were held to be permanent. The Board attempts to meet this contention by arguing that the Court below would have sustained the award of back pay even if the severance had been temporary. It is argued that since the Court found the permanent severance to be for an unlawful purpose, it would have also found a temporary severance to have been for the same unlawful purpose,[1] and therefore petitioners' argument is inapplicable.

Petitioners' Argument.

Petitioners' argument as to the award of back pay is that even if the Court below upheld the Board's alternative finding of a wrongful intent in effecting a temporary severance, the added presence of such factor could have no effect upon the question of whether back pay should have been awarded. The wrongful intent with which the employers here might have exercised a right which the Court below held they could lawfully exercise absent any wrongful intent would perhaps have the effect of changing an otherwise lawful action into an unfair labor practice. But the addition of any improper intent could not, under the circumstances here, have caused any financial loss to the employees, whatever effect it may have had upon the Union. An intention to

1. The Board has also suggested that the Court below has already approved the Board's alternative finding that there was a temporary severance with an unlawful intent and that back pay was therefore proper. The Board states (Br. 14): "Thus, contrary to petitioners' assumption, under the principles laid down by the court below which petitioners accept as the 'law of the case' (Pet. 17), even a temporary severance where motivated by a purpose not merely to resist the union's demands but also, as here, to discourage membership in the Union, affords a proper basis for the award of back pay." However, the footnote to this statement admits that the Court "found it unnecessary to deal with" this issue, "since it accepted the finding that the severance was permanent." (Br. 14-15, n. 5.)

permanently discharge is no less unfair than an intention to temporarily discharge for an unlawful purpose. In any event petitioners could have, as the Court below held, temporarily severed the employment of their salesmen for the sole purpose of resisting the "whip-saw." The Board's argument that the added element of wrongful intent would have the effect of justifying an award of back pay clearly indicates a determination on the part of the Board to punish petitioners merely for their supposed motives, rather than for any overt action taken.

The validity of petitioners' argument depends not on what the Court below might have done, but on what it did. The Court did hold that petitioners could properly have temporarily discharged its employees for the duration of the strike against one member of petitioners' associations. If the Board's argument is intended as a denial that such was the holding, then its position presents a conflict between the holdings as to the use of lockout of the Ninth Circuit in *Leonard* v. *N. L. R. B.*, 205 F. 2d 355 (C. A. 9, 1953), and the Seventh Circuit in the instant case. If such is the Board's position we now urge this conflict between circuits as a further ground for granting this petition. If, on the other hand, the Board admits that lockout was available to petitioners but urges in support of the back pay award that these petitioners went too far, either by intending temporary severance plus a bad motive or by intending permanent severance (in itself unlawful), such additional elements might well make the otherwise lawful action discriminatory or an unfair labor practice. The additional elements would not, however, entitle these employees—all of whom were judicially determined to be strategic strikers—to back pay any more than were the Old Rose salesmen. In neither case is the loss of wages "conclusively attributable" to petitioners' conduct.

The Second Opinion of the Court Below.

The Board's assertion in its Brief that the Court below would have sustained the Board's finding that even if petitioners temporarily discharged their salesmen such discharge was with an unlawful intent is not only irrelevant as an attack upon petitioners' argument as to back pay but is also reckless in its regard for the record. The Court below neither reviewed that finding nor indicated its position with respect thereto were it called upon to review such question. The Board has, in its Brief, removed from context the Court's observation near the close of its opinion that the Board found a permanent discharge "inspired by an intent to interfere with the employees' selection of a bargaining agent." (Br. 11.) The Board attempts to transform this observation by the Court as to what the Board—not the Court—found into a finding by the Court. However, when the Court set forth the finding of the Board to indicate what it intended to review, it stated that on the first issue the Board had found that "the evidence preponderates in favor of a finding * * * [of] a permanent *discharge* and not a temporary layoff." (R. II-881.) It was this finding that "adequately complied with the directions of this Court." (R. II-882.) And when the Court came to a consideration of the issues, after admonishing the Board as to the respective functions of superior and inferior tribunals, it described the issue under review as whether there was a temporary severance or layoff as the Trial Examiner found, or a permanent severance, as the Board found. (R. II-885.) This was the issue, which if adequately supported by the evidence "ends the matter." (R. II-885.) Again it described the issue as "When the employer action was taken was it intended that, upon the cessation of the strike, the salesmen would be automatically reinstated or that it would be necessary

for them to reapply for reemployment?" (R. II-887.) The issue the Court reviewed thus had nothing to do with "an intent to interfere with the employees' selection of a bargaining agent" and no relevant evidence of such an intent was mentioned by the Court.

In view of the absence of any finding by the Court below as to unlawful intent as claimed by the Board, petitioners respectfully submit that the use of this mythical finding of the Court by the Board in its Questions Presented, Statement and Argument is wholly unwarranted and is an imposition upon this Court.

If the Board's insistence that the finding as to purpose of the temporary severance is deemed to be important with respect to the back pay question, then petitioners now urge as a further ground for granting the petition that they have been denied judicial review of this Board finding and the cause should be remanded to the Court of Appeals for consideration of this question. *N. L. R. B.* v. *Pittsburgh S. S. Co.*, 337 U. S. 656, 661-2 (1949); *Aetna Casualty Co.* v. *Flowers*, 330 U. S. 464, 468 (1947); *Gerdes* v. *Lustgarten*, 266 U. S. 321, 327-8 (1924); *Fox* v. *Gulf Refining Co.*, 295 U. S. 75, 76 (1935).

The Board's Evidence.

The extreme lengths to which the Board has gone to assert that there has been a determination by the Court below sustaining the Board's finding of an intent on the part of petitioners to discourage Union membership, was prompted, petitioners submit, by the desire of the Board to avoid judicial scrutiny of this issue because of the character of the evidence relied on by the Board as supporting its finding as to wrongful intent. The only evidence before the Board that petitioners intended to discourage membership in and destroy the Union is the un-

responsive, gratuitous, and controverted reply of a Board witness on cross-examination. This witness, Allen Schultz, had testified on direct examination that the employers tried to effect a "legal discharge" and not a "lockout" which he said was thought to be illegal. On cross-examination he was asked "Was it our purpose to take these salesmen back when the strike was over?" He replied: "I would say that we had discussions at that meeting that maybe—well, I would say that you had discussions about maybe not having a union and breaking the union." (R. II-227.) That is the only evidence in the entire 1400 page record supporting this finding, and this evidence was directly refuted by witnesses for petitioners who were present at the meeting to which Schultz alluded. (R. II-419-20, 432.) Even this equivocal statement was not fairly stated by the Board in support of its alternative finding. It will be noted the witness had testified that the discussion was about "*maybe* not having a union." The Board described Schultz's testimony—its only support for the finding of unlawful intent—as follows: "He [Schultz] testified that the Petitioners embarked upon their course of action after discussions which contemplated '*not having and breaking the union.*'" (Board's italics, R. II-66.) The "maybe" which the Board omitted in its opinion has been quietly and graciously restored in its Brief. (Br. 8-9.) It is inconceivable that the Court of Appeals would affirm a Board finding based upon such tenuous evidence.

Conclusion.

Petitioners respectfully submit that the Board's Brief well confirms the view expressed by the Court below in its second opinion that the Board in refusing to accept the Court's ruling on the effect of a temporary severance "implies an attitude on the part of these [Board] mem-

bers to have their ultimate judgment that petitioners had engaged in unfair labor practices recognized in any event." (R. II-884.) This attitude of the Board in a vital area of labor-management relations clearly accentuates the need for review by this Court.

Further, it should be noted that the Board has not attempted to controvert the showing made by the petitioners that the questions presented here are of great consequence to employers and employees as well as the public in an already large and rapidly expanding field of multi-employer bargaining. The novel and crucial questions involved are thus tacitly admitted by the Board to be of that magnitude which has historically been the basis of a grant of certiorari by this Court.

Respectfully submitted,

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December 1, 1953.